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In The

Supreme Court of the United States

October Term 1998

CALIFORNIA DENTAL ASSOCIATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1/]

The American Society of Association Executives ("ASAE"), has a strong interest in the outcome of this case. ASAE is itself an individual membership nonprofit organization and an umbrella organization serving executives of many other such organizations. ASAE's membership includes 24,000 association executives and staff, who are employed by more than 11,000 organizations. Approximately one-third manage charitable and social welfare organizations. The remaining two-thirds manage professional societies or trade associations. ASAE addresses only the first question presented in this case, the Federal Trade Commission's jurisdiction. ASAE is uniquely placed to assist the Court in its consideration of the issues raised because it is familiar with the wide range of membership structures, purposes, and activities of thousands of nonprofit membership organizations potentially affected by the Ninth Circuit's ruling below.

STATEMENT

> Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to

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1/ The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than amicus, its members, or counsel contributed money or services to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

> construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. . . . Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.

Alexis de Tocqueville, Democracy in America 106 (Everyman's Library 1994) (1835).

The extraordinary variety of nonprofits in this country counsels in favor of a careful approach to defining the limitations Congress imposed on the Federal Trade Commission's jurisdiction, in order to avoid unexpected and unwarranted effects on organizations that Congress intended to leave outside that jurisdiction. All parties agree that Congress did not provide the Federal Trade Commission ("FTC" or "Commission") with the power to investigate and discipline every type of nonprofit entity. The guidance this Court will provide to the Commission and to the public as to the scope of the FTC's jurisdiction affects a huge range of nonprofits that are significantly different from each other and from the group before the bar. These membership organizations do not fall neatly into a few simple categories.

There are more than a million nonprofit organizations in this country.[2/] They undertake a vast array of useful activities

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2/ According to Internal Revenue Service data, in 1994 1,138,598 organizations qualified under federal tax-exempt law (which is a majority of the organizations formed under state nonprofit corporation laws). Of these 599,745 were charitable, educational, arts or religious organizations; 140,143 were cause-related social welfare organizations; 74,273 were

that, in other countries, are undertaken by government or not at all. Nonprofits sponsor libraries, opera companies, symphonies, art museums and cater to enthusiasts for particular artists. Local historical societies preserve and study the past; health charities sponsor public awareness and research to improve the present and future. Fraternal service organizations such as the Brotherhood of the Paternal Order of Elks and religiously affiliated service organizations such as the National Council of Jewish Women or the YMCA provide many community services. Nonprofits foster amateur sports competitions. Organizations of schools, such as the American Association of Universities, and of those who teach particular subjects, such as the American Association of Math Teachers, work to improve education. Even government entities and government employees often form or join private membership organizations, such as the American Association of Counties, the National Association of District Attorneys, the National Association of Chiefs of Police, the National Association of School Nurses, to improve the services provided by government. There is at least one membership group for virtually every line of work and at least one trade organization for virtually every line of business. There are also thousands of organizations to further particular causes, such as the Sierra Club (conservation), AARP (the welfare of seniors), the National Right to Life Committee (prohibition of abortion), Common Cause (campaign finance reform), and the ASPCA (the welfare of animals).

Virtually all nonprofit membership organizations fill a significant gap by providing specialized education, to which

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professional societies or trade associations, 92,284 were fraternal service organizations, and so on. Independent Sector, *Nonprofit Almanac, Dimensions of the Independent Sector, 1996-1997* 38 (Independent Sector 1997).

they devote substantial resources. Membership education and training is the single largest budget item for organizations. *See* Public Opinion Strategies and Greenberg Quinlan Research, *The Value of Associations to American Society* (May 1998). One out of every four dollars these nonprofits spend is spent on either member or public education; 95 percent of all organizations offer educational programs to members, and 79 percent are involved in educating the public. *Id.* The CEOs of these nonprofits believe that education is the most important reason their members belong. *Id.* By providing current information and highly specialized training, these groups play an important role helping adults adapt their skills or learn entirely new fields in order to remain productive in a world undergoing rapid scientific and technological change.

Some nonprofits, like traditional educational institutions, have formalized certain areas of education and signify each person's successful completion of these programs by issuing a credential that informs colleagues and the public that the person has met the established requirements. Most accreditation of traditional educational and other institutions is also provided by nonprofit groups. For example, the National Association of Schools of Public Administration accredits public administration programs. The Joint Commission for the Accreditation of Health Care Organizations accredits hospitals. Some trade associations have established standards that those in their trade should meet in order to properly serve the public. Businesses that pass muster are given a credential that can be displayed to the public. Approximately 22 percent of nonprofits have established some type of credentialing program, and on average, that credential has been awarded to only one-quarter of their members. ASAE, *Policies & Procedures in Association Management* 13 (1996). Such programs generally impose higher standards than are imposed by government or impose

standards in fields or markets the government does not specifically regulate. In addition, they provide information to consumers who are ill situated to make their own assessments.

In the sciences, both pure and applied, membership organizations have long played a significant role in fostering scientific research. The American Association for the Advancement of Science holds symposia during which scientists present and discuss new research. Many professional societies, composed of members from one particular discipline, are primarily scientific organizations focused on encouraging, funding, publishing and discussing new research and theories in their respective fields. Their journals are frequently the premier scientific journals in the field. The pre-publication peer reviews, instituted and coordinated by these societies, provide readers with a significant measure of confidence in the quality of the work published. By serving as forums, publishing and holding symposia, these societies provide incentives that encourage research, the results of which advance our understanding and our ability to solve problems. Hudson Institute, *The Value of Associations to American Society* 80 (ASAE 1990) ["Hudson"].

Many nonprofits undertake research projects directly. The Healthcare Forum co-sponsored an investigation of methods to reduce the turnover of hospital nurses, a problem affecting patient care as well as hospital administration. Hudson at 86. Nonprofits' research is often of value to government entities which use the results for their programs. The American Institute of Physics, for example, provides statistics on scientific manpower to the Department of Energy, the Department of Defense, and NASA, among others. The National Council of Jewish Women has surveyed day-care facilities and the juvenile justice system, evaluated child abuse programs, and more. A

pilot program of the Council later became institutionalized as the federal Retired Senior Volunteer Program. *Id.*

Specialized education programs for the public are also services nonprofits can, and do, provide. The Chemical Manufacturers Association, for example, has a program to inform communities about the chemicals manufactured and stored in local plants and to coordinate area-wide emergency response, including early warning systems. It also provides callers with emergency information for responding to chemical incidents. Hudson at 45. The American Association of Neurological Surgeons and the Congress of Neurological Surgeons sponsors a national head and spinal cord injury prevention program aimed at educating teenagers and young adults about injury risks and methods of prevention. *Id.* at 106. The videos and other materials distributed by nonprofits regularly provide needed, specialized information to the public.

Another quasi-governmental role that is commonly undertaken in this country by nonprofits is setting standards. For example, the American Red Cross sets standards for the safe handling of blood products. Hudson at 50. Governments often rely on privately promulgated standards as the bases for codes they enact. The American Bar Association's Model Rules of Professional Conduct is an example well known to the legal profession. Most local building codes are based on standards developed by nonprofits. The Financial Accounting Standards Board promulgates Generally Accepted Accounting Principles (GAAP) which standardizes accounting so that companies, shareholders, or government can understand the assumptions and levels of review underlying accounting documents and establishes the analysis necessary to portray the financials of an enterprise under scrutiny. Other nonprofits serve similar functions less formally by providing the public with

information with which to make evaluations. For example, the American Institute of Philanthropy provides potential donors with ratings, opinions and other information on financial and managerial practices of a wide variety of charities. 1 Encyclopedia of Associations, pt. 2 at 11516 (Sandra Jaszcak ed., Gale Research 31st ed. 1996).

Finally, nonprofits provide a wide range of community services. Some, such as Kiwanis International, combine fellowship with community service . Others, such as the World Wildlife Federation, devote their efforts to working toward their vision of a better world for all. Organizations of individuals engaged in a particular line of work and organizations of businesses frequently use their special skills and access to help their neighbors. The Grocery Manufacturers of America, for example, organized a national network of food banks that donate and distribute more than 100 million pounds of food and other groceries annually. Hudson at 103. The anti-drug advertisements sponsored by Partnership for a Drug-Free America are provided through a program of the American Association of Advertising Agencies. It arranges hundreds of millions of dollars of free broadcast time and print space, as well as free production of the advertisements. *Id.* at 104. The National Association of Truck Stop Operators uses the truck stop network to identify and return missing children. *Id.* at 105. The National Association of Broadcasters has a program to retrain workers displaced from declining industries. *Id.* at 108.

Even these few examples demonstrate that nonprofit membership organizations are not only different in nature from for-profit commercial businesses, but also that they serve -- and have always served -- many needs that might otherwise fall to government, or through the cracks altogether. Further, there is a very broad and diverse spectrum of nonprofits in this country

and generalizations aimed at reaching some could easily, albeit unintentionally, pull in others of a very different character.

SUMMARY OF ARGUMENT

The FTC has expanded its reach far beyond the jurisdictional scope envisioned by Congress. In the FTC's view, its jurisdiction extends to charities, environmental and other cause-related groups, professional societies organized to foster and disseminate scientific research, fraternal service organizations, and many other nonprofits Congress never intended to be regulated under the Federal Trade Commission Act. *See* 15 U.S.C. §§ 41 *et seq.* ["FTC Act"].

1. The plain meaning of the statutory language -- restricting the Commission's jurisdiction to corporations organized for someone's "profit" -- limits the FTC's reach to commercial businesses and sham trade associations. Pt. I.

2. Even if the term "profit" is accorded a more metaphorical import, the statutory language, supported by the legislative history, restrains the FTC from regulating nonprofits primarily dedicated to public purposes. Pt. II.

In the absence of guidance from this Court, the Commission has engaged in an expansive quest that has required charities and scientific groups to divert resources from their charitable and scientific work to legal defense, and discourages nonprofits from pursuing many public-minded programs that benefit consumers and the community generally. *Amicus* urges the Court to take this opportunity to clarify the scope of the FTC's jurisdiction.

ARGUMENT

I. THE PLAIN MEANING OF "PROFIT" PRECLUDES FEDERAL TRADE COMMISSION JURISDICTION OVER GENUINE NONPROFIT GROUPS.

The statute restricts FTC jurisdiction over corporate-type entities. The FTC may investigate and discipline only an entity "which is organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. Under this definition, the FTC clearly has jurisdiction over commercial businesses, because they are organized to carry on business for profit. The Commission also has jurisdiction over cooperatives, because they are organized to carry on business for the profit of their members. It may also be arguable that the Commission has jurisdiction over a nominally nonprofit trade association that is actually organized to facilitate, for example, its members' price fixing on the ground that the nonprofit shell can be pierced when the association is -- in fact -- simply a vehicle for its members to realize profits. The Eighth Circuit has suggested that the FTC's jurisdiction would reach such a sham association. *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1019 (8th Cir. 1969) (FTC could "hold liable a non-profit corporation found to be the tool of corporations organized for profit which these corporations manipulate for evil ends").

The language of the statute, however, does not permit the FTC to reach *bona fide* nonprofit organizations unless the word "profit" is disregarded as a limitation. A *bona fide* nonprofit group is not, by definition, organized to carry on business for its own profit. Most *bona fide* nonprofit groups are also not organized to carry on business for the profit of their members. It is undisputed that these groups do not distribute profits to

their members. Indeed, if they are organized under federal tax-exemption law, they are prohibited from doing so.

For example, a nonprofit organization qualifies for federal tax exemption as a charitable, scientific, literary, public safety, educational, anti-cruelty, etc. organization not only because it has been organized exclusively to pursue the goals specified in the statute, but also because "no part of the net earnings of [the organization] inures to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(3). Likewise, a nonprofit organization qualifies for federal tax exemption as a business league (which includes associations of businesses in a particular area and many individual membership organizations) not only because it is a business league that is not organized for its own profit but also because "no part of the net earnings of [the organization] inures to the benefit of any private shareholder or individual." *Id.* at § 501(c)(6). Nonprofit cause-related or advocacy organizations that qualify for federal tax exemption as social welfare groups, such as AARP, share the same significant characteristic: no part of the net earnings of such a group "inures to the benefit of any private shareholder or individual." *Id.* at § 501(c)(4). Thus, these organizations, and many other nonprofits, *see, e.g.*, § 501(c)(7), (9), (11), (13), (19), (26) -- by law -- are *not* organized for doing business for their members' profit, because the net earnings of their business activities may not inure to the benefit of their individual members or their business members' shareholders.[3/]

3/ These provisions were included by Congress in the first income tax law, which it enacted only one year before the provisions at issue here. *See Tariff of 1913*, Ch. 16, 38 Stat. 114, 172 (1913) (providing that charitable, scientific, educational, and religious associations, business leagues, fraternal beneficiary societies, civic leagues operated for the promotion of social welfare, and others were not subject to the income tax as long as they were "not organized for profit" and "no part of the net income of [the organization] inures to the benefit of the private stockholder or individual").

The court below found that the FTC had jurisdiction over petitioner only by disregarding the ordinary and usual meaning of "profit" and therefore the limitation Congress imposed when it used that word. The Ninth Circuit recognized that organizations such as petitioner do not "distribute 'gain' to their members in the same sense as a for-profit corporation" and that "no genuine nonprofit entity does." Pet. App. 16a. The Ninth Circuit also recognized that the "pecuniary benefits" to petitioner's members, on which the FTC based its jurisdictional claim, were not actually profits but merely "a surrogate for 'profit.'" Pet. App. 16a. The court below affirmed the FTC's assertion of jurisdiction only by declining to apply the plain meaning of the statutory text, and applying a "more expansive view of 'profit' instead." Pet. App. 15a-16a. *See also FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975) (acknowledging that the organization only pursued profit for its members "indirectly").

Because the traditional and generally accepted meaning of "profit" from carrying on a business is the amount of income received over and above the amount of expenses incurred, and because it is not even alleged that petitioner was organized to distribute such income to its members -- or that petitioner did distribute such income to its members -- the decision below should be reversed. Under the plain meaning of the statute, the FTC does not have jurisdiction over *bona fide* nonprofit groups.

II. THE STATUTE ALSO LIMITS FTC JURISDICTION TO ENTITIES WHOSE PRIMARY PURPOSE IS CARRYING ON BUSINESS FOR THEIR OWN PROFIT OR THE PROFIT OF THEIR MEMBERS.

Even if this Court interprets the term "profit" as including indirect pecuniary benefits as well as net income, as the government urges, it should also address other limitations imposed by Congress in order to provide needed guidance to the FTC in determining which organizations are included and which are not. Operating without that guidance, the FTC's view of its own jurisdiction in recent years has been expansive and expanding. The FTC has claimed jurisdiction to reach most nonprofit organizations. It has instituted investigations of major health charities, scientific groups, and more. And its view of its jurisdictional reach is still evolving. Whatever this Court's interpretation of the term "profit," the text of the statute establishes that the FTC was delegated jurisdiction only over organizations which have, as a primary purpose, the pursuit of profit for themselves or for their members. The legislative history supports such limits on the FTC's role.

A. The Statute

The FTC Act establishes the Commission's jurisdiction over unfair competition through two provisions. Section 45(a) empowers the FTC to prevent "persons, partnerships, or corporations" -- with certain listed exceptions -- from engaging in unfair methods of competition. 15 U.S.C. § 45(a)(2). Section 44 defines "corporation" for purposes of the statute as: a company, trust or association -- whether incorporated or unincorporated, with or without shares of capital or capital stock or certificates of interest -- "*which is organized to carry on business for its own profit or that of its members.*" 15

U.S.C. § 44 (emphasis added). Corporations and associations that are *not* organized for their own profit or that of their members are expressly excluded from the FTC's jurisdiction.

This language stands in evident contrast to the language Congress used when it enacted the Clayton Act the same year as it enacted the FTC Act. And it is similarly different from the language Congress has used in other antitrust statutes. In the Clayton Act, Congress prohibited every "person" from engaging in tying, exclusive dealing, price discrimination or interlocking directorates. *See* 15 U.S.C. §§ 12-27. "Person" is defined, for purposes of the act, "to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." *Id.* at § 12. In contrast to the FTC Act, no limitations whatsoever are placed on which corporations or associations are subject to the Clayton Act. Similarly, the Sherman Act had been expressly made applicable to all corporations and all associations. 15 U.S.C. §§ 1, 2, 7.

The jurisdictional provisions of the Robinson-Patman Act provide another useful comparison. In that Act, Congress prohibited price discrimination with respect to sales to all corporations and associations, among others, except sales of supplies to "schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit" for their own use. 15 U.S.C. § 13c. Thus, the Act's prohibition applies to sales to commercial businesses, sales to individuals, sales to nonprofits other than those specifically listed, and sales to schools, libraries, hospitals, etc. of any goods the organization purchases for resale rather than use.

These jurisdictional provisions are instructive because of the contrast with the provisions in the FTC Act. When

Congress intended an antitrust law to reach all nonprofits, it expressly provided that the law would apply to all corporations and associations. When Congress intended an antitrust law to reach many types of nonprofits -- but not all -- it provided that the law applied to all corporations and associations except those in specific, listed categories. The FTC Act adopts neither approach, demonstrating that Congress did not intend it to reach either all nonprofits or all nonprofits other than charities. Instead, Congress defined a different, and more limited, jurisdictional scope: corporations and associations which *are organized* to carry on business for their own profit or that of their members. Commercial businesses are organized to carry on business for their own profit and are therefore clearly within the Commission's jurisdiction. Nonprofit organizations, however, only come within that jurisdiction if a primary purpose -- a purpose for which they are *organized* -- is to carry on business for the profit of their members.[4/]

Thus, wholly apart from any jurisdictional limits imposed by the term "profit," Section 44 excludes FTC jurisdiction over many types of nonprofits, such as charities, arts organizations, professional societies primarily devoted to education or to fostering scientific research, professional societies primarily devoted to other public purposes, fraternal service organizations, cause-related groups, and many others, because

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4/ This does not, of course, place large numbers of nonprofit organizations beyond the reach of the antitrust laws. Anticompetitive behavior will be discouraged by, and can be punished under, both the Sherman Act and the Clayton Act. Many nonprofits are also subject to the proscriptions of the Robinson-Patman Act. Moreover, most states have antitrust laws to which nonprofit organizations are subject. And both federal and state law provide private rights of action.

profit -- however defined -- is not an "organizing" or central purpose of the nonprofit.

B. Legislative History

1. 1914

The House and the Senate did not initially agree as to the scope of the FTC's jurisdiction. The bill the House of Representatives passed defined "corporation" as "a body incorporated under law, and also joint-stock associations and all other associations having shares of capital or capital stock or organized to carry on business with a view to profit." H.R. 15613, 63d Cong. § 6, reproduced in H. R. Conf. Rep. No. 63-1142, at 11 (1914). In the House's view, the creation of the FTC was aimed solely at commercial businesses. Thus, the House Report explained that: "The whole theory of the creation of the commission has been to make it an efficient and useful independent body, concerned with the maintenance of proper supervisory relations of the Federal Government over industrial corporations engaged in interstate commerce." H. R. Rep. No. 63-533, at 8 (1914).

The Senate substituted its own bill, keeping the same definition of corporation. S. Rep. No. 63-597, at 1 (1914). However, it added a separate section that increased the scope of the FTC's jurisdiction to "extend over all trade associations, corporate combinations, and corporations as hereinbefore defined engaged in or affecting commerce except banks and common carriers." *Id.* at 3. The Senate Report explained that

trade associations were to be "[s]pecifically subject to the jurisdiction of this commission." *Id.* at 11.[5/]

The House refused to accept the Senate's amendments and the jurisdictional question, among others, was referred to conference. The bill that emerged from the conference committee had deleted the Senate's specific inclusion of trade

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5/ The government suggests that the impetus for expanding the FTC's jurisdiction was a letter, dated August 8, 1914, from the Commissioner of the Bureau of Corporations complaining to Sen. Newlands, author of the Senate bill that the initial proposals could prevent the FTC from regulating trade associations. Opp'n Cert. at 11-12. The government's source appears to be a reference in *Community Blood Bank*, 405 F.2d at 1017-18, to an unpublished letter submitted to that Court by the Commission. *Id.* at 1017 n.12. It is unclear what role, if any, such a letter played since it is dated *after* the Senate committee added "trade associations" to its version of the bill. *See* S. Rep. No. 63-597 at 1 (the Senate Report, with the new provision, issued June 13, 1914). Indeed, the full Senate had passed that version three days before the letter was written. 51 Cong. Rec. 13318-13319 (1914). In any event, the letter did not urge the inclusion of all nonprofits, or even all nonprofits other than charities. It urged only the inclusion of "associations of manufacturers or dealers (trade associations)." *Community Blood Bank*, 405 F.2d at 1017. Thus, whether the letter represented Sen. Newlands' after-the-fact "papering" of the record or was actually read by the conference committee, it evidences that the expansion of FTC jurisdiction was envisioned as -- at most -- an expansion to associations of manufacturers and dealers, not an expansion to professional societies, scientific groups, service organizations, charities, or any other of the vast array of nonprofits.

associations and had added a phrase to the House version that placed within the FTC's jurisdiction any corporation or association without stock "which is organized to carry on business for its own profit or that of its members." H.R. Conf. Rep. No. 63-1142, at 3 (1914). The Conference Report's explanation was that the various "definitions . . . remain substantially as in section 4 of the House bill." *Id.* at 18. In other words, the conferees believed that they had adopted a scope of jurisdiction closer to the House Bill (which was limited to commercial businesses) than to the Senate Bill (which had included trade associations and commercial businesses).

Thus, the legislative history provides support for the view that Congress did not intend the FTC to regulate nonprofits unless they were mere vehicles for unlawful anticompetitive activities. Furthermore, the legislative history makes very clear that Congress never intended to provide the FTC with jurisdiction to regulate professional societies, scientific groups, charities, advocacy groups, fraternal service organizations, etc. The only nonprofits that any chamber even considered placing within the FTC's jurisdiction were trade associations of commercial manufacturers or dealers -- a plan the Conference Committee receded from in order to reach compromise.

2. Subsequent Congressional Action

Twenty-one years ago, the FTC asked Congress to amend the FTC Act to expand the Commission's jurisdiction beyond the limits Congress had imposed by placing nonprofits within the FTC's scope. *Hearings on H.R. 3816 Before the Comm. on Interstate and Foreign Commerce*, 95th Cong. 69 (1977). The House Committee on Interstate and Foreign Commerce rejected the proposed amendment. H.R. Rep. No. 95-339, at 120 (1977). Rep. James T. Broyhill (R. N.C.) expressed his

approval of the Committee's rejection of the amendment on the House floor:

> I am pleased that the committee has deleted one particularly offensive provision. That provision would have altered the term "corporation" under the present FTC law by including not-for-profit organizations. The effect of this major change would have been immediately to extend FTC authority to include regulation of not-for-profit organizations on the same basis as business corporations. That would have meant that every college and university, professional association, church, social club, philanthropy, charitable organization or any other voluntary membership or eleemosynary organization would have been subject to FTC regulation.

123 Cong. Rec. 33622 (Daily Dig. Oct. 13, 1977) (statement of Rep. Broyhill). Rep. Broyhill noted that nonprofits were "completely different from business organizations in purpose, intent, and 'ownership'" and that the "FTC itself provided a very weak case for the need or necessity of extending its already expansive ambit to encompass not-for-profit organizations." *Id.* In contrast, he noted, the American Dental Association and the American Medical Association, among others, had "presented a strong and convincing argument against inclusion in FTC authority." *Id.*[6/] Thus, as recently as 1977, Congress appears to have understood the FTC not to have jurisdiction over professional societies, charitable organizations, or any other nonprofit membership organizations.

6/ *See also* H.R. Rep. No. 95-339, at 120 (1977) (minority report) (explaining that the FTC's current jurisdiction is limited to profit-making bodies).

C. The Commission's Expanding Sights

For many decades, the FTC asserted jurisdiction only over commercial businesses and, on occasion, a traditional trade association -- an organization of businesses engaged in a particular trade. *See, e.g., FTC v. Association of Flag Mfrs. of America*, 1 F.T.C. 55 (1918).[7/] More recently, with no change in its statutory empowerment, the FTC has assumed jurisdiction over professional societies, charities, and others. *See, e.g., Community Blood Bank*, 405 F.2d 1011; *American Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980) (affirming FTC's jurisdiction over the AMA), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

Since at least 1982, the Commission has taken the position that it is empowered to reach any membership organization that engages in more than incidental activities regarded by the FTC as potentially beneficial to its members. *See, e.g.*, Pet. App. 49a, 14a. In the FTC's words, it has jurisdiction over any membership organization that engages in activities that generate a pecuniary benefit to its members, if those activities constitute "a substantial part of the total activities of the organization," Pet. App. 49a (internal quotations omitted). The Commission then defines "substantial" as anything other than "merely incidental." *Id.* Thus, in the FTC's view, it is not limited to regulating nonprofits that "are organized" to carry on business for the profit of their members; it is free to regulate any nonprofit that engages in more than "incidental" activities that can be viewed as potentially beneficial to its members.

7/ *Amicus* does not believe that the FTC's jurisdiction to reach even these traditional trade associations has been raised before, or addressed by, this Court.

The FTC has taken further steps to ensure that this low threshold standard will be met by many nonprofit groups by designating activities that serve the public interest as activities that are engaged in solely to provide "pecuniary benefits" to its members. For example, in *In re Michigan State Medical Society*, 101 FTC 191 (1983), the society's efforts to ensure that those treating patients had the benefit of information about recent discoveries and techniques were counted as activities providing profits to members because the continuing medical education programs were offered to members at a lower price than to nonmembers. The fact that the members had already paid the difference in price -- and more -- by paying dues, and the fact that the beneficiary of the education was the public, was wholly disregarded. *Id.* at 221.

In the decision below, the administrative law judge similarly counted scientific sessions, aimed at keeping those who treat the public abreast of new scientific information, as an activity engaged in merely to increase member profits because it was provided free to members. Pet. App. 254a. The public value of continuing to educate medical professionals, in whom lay people have no choice but to place their trust, was ignored (as was the fact that members had paid dues and were therefore not, in fact, receiving anything "free"). Similarly, the ALJ counted petitioner's publication of technical and scientific information to be another base effort to increase its members' profits. *Id.*

If not outright disingenuous, these classifications are at the least naive. Newer techniques may be less costly to patients than older ones. For example, current medical practices frequently allow patients to spend less time in hospitals than previously thought prudent; pharmaceuticals are now recommended where previous practice would have indicated surgery, and more. Further, many scientific papers and

publications involve basic science, or early stages of research, and are therefore of intellectual -- not practical -- value to the members. Providing medical practitioners with this kind of scientific and technical information may improve their understanding and even their skills (and therefore the public's health), but it can hardly be relied on to increase their profits.

Finally, petitioner's efforts to provide patients with a ready, and affordable, means of resolving complaints against dentists through a peer review system was classified as an activity for the purpose of increasing members' profits, because it "may provide a less costly alternative to traditional methods of resolving patient complaints about dental problems." *Id.* at 253a. The ALJ did not attempt to determine whether members were actually better off, much less whether the program was actually adopted to, and did, provide significant advantages to the public. Certainly, it is possible for a member to be better off if a patient who would win in court chooses to use the peer review system instead. But a patient who could win in court would be likely to find representation on a contingent basis. In more ambiguous situations, most patients are even less able to afford litigation than medical practitioners. The practitioners have malpractice insurance; the patients do not. Many patients, absent petitioner's program, would have no practical remedy. Thus, the allegedly self-serving program actually exposes its members to far more patient complaints, and potential liability, than does the court system. And it does so without relieving its members of any risk. Those patients able to afford representation to sue in court, or to obtain it on a contingent basis, retain the right to do so. It is ironic that, at a time when so many courts are encouraging parties to use alternative dispute resolution programs, the FTC would find a voluntary offer of such services -- to patients who cannot afford, or do

not wish, to sue in court -- to be an pecuniary benefit for those whose work and billing practices will be challenged.

Under this approach, virtually any activity -- however valuable to the public -- can be found by the FTC as providing "pecuniary benefits to members." The malleability of this category renders the FTC's low jurisdictional standard even less of an impediment to skirting Congress' limitation.

In 1994, the FTC improvised an additional jurisdictional standard that could bring nonprofits within its reach even if the nonprofit engages in *no* activities of arguable pecuniary benefit to its members. The FTC's view is that it has jurisdiction over such nonprofits if their fund-raising activities are not closely related, in nature, to their public purposes. *See In re College Football Ass'n*, 5 Trade Reg. Rep. ¶ 23,631, 23,357 (July 8, 1994); Pet. App. 50a. This test is not a means of requiring that the funds raised are used solely to further the nonprofit's public purposes. This test is only applied if the funds raised *are* used solely to further those public purposes. To meet the test, there must be an adequate nexus between fundraising that involves commercial activities and the public purposes to which the funds will be put. *In re College Football Ass'n* at 23,355. By its terms, the test places a PTA that holds a bake sale to benefit a school, or a health charity that sells second-hand furniture and clothing to raise money, well within the FTC's jurisdiction.

The FTC's attempt to justify this decision within the rubric of the jurisdictional scope Congress actually provided is curious. The FTC recognized that if a nonprofit did not engage in activities that, by anyone's definition, could be considered for the profit of its members, then the FTC only had jurisdiction if the nonprofit was organized for its own profit. *Id.* at 23,354. Nonetheless, the Commission did not reach the seemingly

inevitable conclusion that such a nonprofit was outside its jurisdiction. Instead, the FTC decided that "the source of the [nonprofit's] income provides another basis" for its jurisdiction. *Id.* at 23,355. The FTC could not derive support for this proposition from its own statute so it turned instead to the federal nonprofit tax statute and noted that, to be tax-exempt under the tax statute, an organization had to be both not organized for profit and its activities had to be of a certain type. *Id.* at 23,355-56. Thus, the FTC concluded, the same two-prong requirement is applicable to remove an organization from the Commission's jurisdiction. *Id.* at 23,357.

The FTC's reliance on federal tax law is curious for several reasons. First, although the tax statute, as the FTC found, does contain both requirements, the jurisdictional provision of the FTC Act does not. To be tax-exempt, an organization must not be organized for profit *and* must come within one of the enumerated tax-exempt categories. *See* 26 U.S.C. 501(c)(3). To be outside the scope of the FTC's jurisdiction, however, an organization need only not be organized for profit. Nothing in the FTC Act links jurisdiction to specific public purposes.[8/]

8/ The Commission's decision is also inconsistent with *Community Blood Bank*, which held that the only test for such a nonprofit was whether the organization derived profit for itself. Indeed, that court expressly found that the nature of the nonprofit's activities was "of no relevance." 405 F.2d at 1019. Thus, it explained: "A religious association might sell cookies at a church bazaar, or receive income from securities it holds, but so long as its income is devoted exclusively to the purposes of the corporation" it does not come within FTC jurisdiction. *Id.*

Moreover, the FTC's reliance on the federal tax-exempt statute is also internally inconsistent. For example, in fashioning the nexus test based on the allegedly parallel provisions in the federal tax statute, the FTC paid no heed to the fact that the organization at issue *met* the requirements of the tax statute, and was exempt from federal income tax. *In re College Football Ass'n* at 23,356. The FTC also regularly pays no heed to the tax code provision it found parallel with respect to membership profits. Although the FTC found Section 44's exclusion of groups not organized for the profit of their members parallel to the tax statute's exclusion of membership groups if no part of its net earnings inures to the benefit of its members, *id.*, the FTC maintains that organizations that meet the tax code standard are nonetheless organized for the profit of their members under the FTC Act.

D. The Need For Guidance

The FTC's current view of its jurisdiction permits it to investigate and discipline many organizations that have always, and rightfully, been considered beyond its reach. Many health charities, for example, have members, or are even primarily membership organizations. Members are often ex-patients, families of patients, concerned lay people, and a range of health professionals who treat patients with the disease with which the charity is concerned. *See* Hudson at 26. For example, the American Diabetes Association has, as members, a full range of health care professionals involved with treating diabetes. The Association engages in various activities to foster research through symposia and publications and to improve care through education programs. One of its educational programs is a course in educating diabetics on managing their disease. For completing this program, health care professionals are awarded a credential. The Association also operates an accreditation

program evaluating institutions that treat diabetics. Without further expanding its view of its own jurisdiction, the FTC could use any of these as a basis to exert jurisdiction.

Similarly, a committee within the American Lung Association is the American Thoracic Society, with members who are doctors, nurses, researchers and others in the health profession who work in the field. It holds symposia, during which doctors and researchers and others present and discuss papers. It distributes a newsletter and other medical and scientific publications. And it lobbies for increased research grants to the National Institute of Health. All these activities have previously been found by the FTC as providing pecuniary benefits to members, and nothing in the FTC's jurisdictional understanding would prevent it from exerting jurisdiction over the American Lung Association.

The United Leukodystrophy Foundation, dedicated to improving knowledge about and care for patients with these disorders affecting the brain, spinal cord and peripheral nerves, has members who are medical care professionals, families of patients, and organizations. The Foundation supports research into the causes, treatment and prevention of these disorders, sponsors educational programs about them, and identifies sources of medical care, social services, and counseling for patients and their families. Under the FTC's analysis, identifying sources of medical care for terrified patients is simply drumming up business for the Foundation's members, educating health professionals about these disorders is aimed at improving its members' job prospects, and funding research could be a way of channeling funds to members or a method for expanding their professional opportunities in the future.

The Hemochromatosis Foundation, dedicated to improving the prospects for those with a hereditary disorder of the metabolism that causes the body to accumulate iron, also has physician members along with patients and their families. Because the disorder is not well known, and can be fatal, the Foundation encourages routine use of screening tests by physicians, assists the physicians as well as patients and their families with diagnosis, treatment and genetic counseling, conducts periodic teaching days for physicians, patients and their families, conducts programs on current research, and is establishing a registry of those who have the disorder. Further, the Foundation provides a phone referral service for patients. Again, each of these could be mischaracterized as profit-enhancing for the Foundation's members. Arguably, encouraging testing and providing referrals increases physician members' business; educational programs improve their marketability; and assistance with diagnosis and treatment improves their success rate and efficiency.

A group organized to raise funds for a major symphony could, under the FTC's definition, be characterized as having substantial activities that benefit members -- and therefore within the FTC's jurisdiction -- if some of its members are also members of the orchestra or if members receive discounted tickets to concerts. A community arts council that sponsors art shows, and operates a community arts center with classes for all ages, could similarly be found within the FTC's claimed jurisdiction if some of its members are local artists or art teachers, or if members receive discounts on classes or at sales.

The FTC's nexus test brings other nonprofits, generally considered outside the scope of its jurisdiction, well within. The Girl Scouts of America seems unlikely to be able to show the required nexus between boxed cookie sales and the

organization's public purposes. The American Heart Association, which raises funds through a fine wine auction, faces the same problem, as would many other groups.

The FTC might also use the corporate relationships that many charities use to raise funds for research and public education as a basis to exert jurisdiction. The practice of forming some type of corporate relationships has become extremely common among charities and has often proven an effective fund-raising technique. For example, a few years ago the Arthritis Foundation permitted a pharmaceutical company to put the Foundation's name on a standard pain-relieving product for the treatment of arthritis, in exchange for a substantial contribution for research. The American Heart Association permits its "Healthy Heart" logo to be placed on food that is relatively low in fat, for which it receives funds that are used to defray some of the costs of its charitable activities. The Cancer Society has permitted its logo and telephone number to be used in advertisements and on packaging for the Nicoderm patch. Further, many charities permit commercial businesses, in return for significant contributions, to advertise that they are a sponsor of a particular fund-raising event.

Concern that the Commission would attempt to reach these types of nonprofits is not merely hypothetical. A few years ago, the Commission *did* investigate a major health organization that, in return for a sizeable contribution, had permitted a manufacturer to advertise that it was a sponsor of the charity. Ultimately, the FTC dropped its efforts against the charity, but not before imposing considerable costs for legal fees, responses to discovery requests, etc.

The FTC also targeted a national educational and scientific society of physicians for its policy of not permitting

corporations who advertised infant formula to sponsor educational and scientific events held by the society. The society's position was based on its view that breast feeding was healthier than formula for newborns -- a position incapable of enriching either the society or its members. Although, again, the investigation was eventually dropped, the society had to absorb the costs of legal counsel, responding to two rounds of document requests, and providing a number of depositions.

The FTC's assertion of jurisdiction over organizations clearly beyond its scope directs these organizations' resources into defending themselves from the Commission and away from the nonprofit activities that Congress has long since determined is in the public interest. The FTC's classification of useful pro-consumer efforts such as alternative dispute resolution services, scientific symposia and publications, and continuing education for those the public must rely on discourages nonprofits from developing and providing these programs. Furthermore, there are few charitable or pro-consumer programs that cannot be "recharacterized," so there are few, if any, inherent boundaries on the FTC's ability to circumvent its statutory limitations and its ability to discourage efforts capable of providing significant benefits for consumers, patients, arts enthusiasts, and everyone else whose needs and interests are served by the extraordinary variety of nonprofit groups.

Even the Solicitor General would apparently argue against the FTC's assertion of jurisdiction over charities. *See* Opp'n Cert. at 14. But although that limitation would curb some of the FTC extraterritorial explorations, it is insufficient. Had Congress wished to restrict the FTC's jurisdiction only with respect to charities, it would have said so, as it did in the Robinson-Patman Act. The FTC Act, in contrast, limits the FTC's jurisdiction solely to those corporations or associations

that are "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44.

Congress, thus, imposed a primary purpose test. It did not provide that the FTC had jurisdiction over any nonprofit corporation or association that was engaged in more than *de minimis* activities that could "profit" its members. Congress provided that the FTC had jurisdiction only over those nonprofit corporations or associations that were *organized* for the profit of their members. Only if a primary purpose of a nonprofit organization is to "profit" its members can it come within the scope of the FTC's jurisdiction. Similarly, Congress did not empower the FTC to consider the manner in which nonprofit organizations raise funds to further their public purposes. Any organization that is legitimately qualified for tax-exemption as a nonprofit organization under the federal income tax laws should also be considered not "organized for its own profit" under the FTC Act.

Because the FTC's current approach is wholly inconsistent with Congress' statute and its goals, clarification by this Court of the FTC's jurisdictional limits is badly needed. Congress may well not have intended the FTC to regulate any *bona fide* nonprofit. It certainly did not intend the FTC to regulate nonprofits that are primarily engaged in pursuing public purposes. But, without guidance from this Court, the FTC's course threatens to divert more resources from public purposes and to discourage private groups from providing many public-spirited and extremely useful services that are beyond the present scope of government.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeals below.

Respectfully submitted,

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